(2)

No. 09-201

Supreme Court, U.S.
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In The
Supreme Court of the United States

SIMPLICITY MANUFACTURING, INC.,
Petitioner,

v.

WAYNE BERRIER AND BRENDA GREGG,
IN THEIR OWN RIGHT AND AS
PARENTS AND NATURAL GUARDIANS OF
ASHLEY BERRIER, A MINOR,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Court overturn the court of appeals' adoption of the Restatement Third, Torts: Products Liability ("Third Restatement") as a violation of the fundamental constitutional principle of federalism embodied in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), in light of the facts that (a) two justices of the state supreme court had, in response to the court of appeals' certification request (denied by the state court), urged the court of appeals to apply current Pennsylvania law narrowly until the state supreme court ruled otherwise, and (b) shortly after the court of appeals' decision, the state supreme court expressly declined an invitation to abandon its long-standing adoption of the Restatement (Second) of Torts § 402A and instead adopt the Third Restatement relied on by the court of appeals?

2. When a state supreme court declines to accept certification of a question of state law, should standards be set that govern the court of appeals' assessment of the state court's action and a concurring statement by two justices of the state court?

LIST OF PARTIES TO THE PROCEEDING BELOW

The names of all parties in the court of appeals are: Simplicity Manufacturing, Inc. (Defendant-Petitioner), and Wayne Berrier and Brenda Gregg, in their own right and as parents and natural guardians of Ashley Berrier, a minor (Plaintiffs-Respondents).

CORPORATE DISCLOSURE STATEMENT

As of January 1, 2008, all of the assets of Simplicity Manufacturing, Inc. have been incorporated into Briggs & Stratton Power Products Group, LLC. Briggs & Stratton Power Products Group, LLC is a wholly owned subsidiary of Briggs & Stratton Corporation, which is a publicly traded company.

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SUPPLEMENTAL BRIEF OF SIMPLICITY MANUFACTURING, INC. IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioner Simplicity Manufacturing, Inc. ("Simplicity"), by and through its counsel, submits this supplemental brief in support of its Petition for Writ of Certiorari. Specifically, this brief discusses two very recent and contradictory strict liability cases that have emerged from the United States District Court for the Eastern District of Pennsylvania. *See Durkot v. Tesco Equip.*, No. 08-4538, 2009 U.S. Dist. LEXIS 82387 (E.D. Pa. Sept. 9, 2009) (Hart, J.); *Richetta v. Stanley Fastening Systems*, No. 07-CV-3814, 2009 U.S. Dist. LEXIS 75230 (E.D. Pa. Aug. 21, 2009) (Golden, J.). These opinions illustrate how the court of appeals' decision in the underlying action has thrust Pennsylvania law into a state of confusion and why this Court's intervention is needed to place responsibility for the evolution of Pennsylvania law back into the hands of the Commonwealth's legislature and judiciary.

ARGUMENT

In the weeks after Simplicity filed its Petition for Writ of Certiorari, two contradictory strict liability cases have emerged from the United States District Court for the Eastern District of Pennsylvania that further highlight the already glaring problems with the court of appeals' decision to change Pennsylvania law and adopt the

Restatement (Third) of Torts ("Third Restatement").[1] In one case, the district court followed the court of appeals decision and applied the Third Restatement to a strict liability claim, while in the other, the district court declined to follow the court of appeals decision and applied § 402A of the Restatement (Second) of Torts ("Second Restatement"), consistent with long-standing precedent authored by the Supreme Court of Pennsylvania.

In the first case, *Richetta v. Stanley Fastening Systems*, one of the plaintiffs sustained a personal injury when a nail gun fell off of a ladder and discharged a nail into his body. Plaintiffs alleged that the nail gun was defectively designed because it "did not have a safety switch or trigger lock and that this defect caused [plaintiffs] injuries." *Richetta*, 2009 U.S. Dist. LEXIS 75230, at *1.

In resolving the case, the district court had to decide, as a preliminary matter, whether the strict liability claim was governed by the Third Restatement or the Second Restatement. *Id.* at 5. The court acknowledged that "the differences between the Third Restatement and the Second Restatement are significant, as the Third Restatement emphasizes foreseeable risks of harm while the Second Restatement stresses. . . whether the product was being used as intended by an intended user." *Id.* *7-*8. Indeed, the district court noted that this difference was particularly significant in the case before it because the central debate between the parties was "whether the

[1] See cases previously provided to the Court under cover of Notice of Supplemental Authority, dated September 25, 2009.

[plaintiff] used the nail gun *as intended* at the time of the accident." *Id.* at *8.

The court ultimately concluded that "Berrier applie[d] and, as a result, the Court [had to] apply Sections 1 and 2 of the Restatement (Third) of Torts to Plaintiffs' strict liability claim under Pennsylvania law." *Id.* at *6. The court acknowledged the Pennsylvania Supreme Court's decision in *Bugosh*, but stated that, "[t]he Pennsylvania Supreme Court's recent refusal to address this issue in [Bugosh], [did] not change the Court's conclusion that the Third Restatement applies to the case at bar." *Id.* at 14. Because *Bugosh* was dismissed as "improvidently granted," the court ruled, it could not infer that the Third Circuit's prediction in *Berrier* was invalid. *Id.* at 15.

Less than three weeks later, the same district court held the exact opposite in *Durkot v. Tesco Equip.* 2009 U.S. Dist. LEXIS 82387, at *17. In *Durkot*, plaintiff sued the manufacturer of a catering lift truck, claiming its defective design caused her personal injuries. The defendant urged the court to apply the Third Restatement to the strict liability claim, in light of *Berrier*. The court, however, declined, emphasizing that a "federal court may not impose its view of what the state law should be, but must apply existing state law as interpreted by the state's highest court. . . ." *Id.* at *7. Indeed, it noted that "[w]here a federal court of appeals in a given case has ascertained what it apprehends to be the pertinent state law, such ascertainment of the local law is binding. . .unless it is clearly made to appear... by binding state court decisions that the

law of the state was other than what the federal appellate court understood it to be." *Id.* at *7-8. Thus, the court stated that it was no longer bound by the court of appeals prediction once "later state court decisions indicate that the Court of Appeals' earlier prediction was in error." *Id.* at *9.

In fact, the district court acknowledged that if it did apply the Third Restatement, in light of the Pennsylvania Supreme Court's refusal to adopt it in *Bugosh*, the district court would "be applying a different standard than what would be applied in state court." *Id.* This would have the troublesome effect of "citizens of Pennsylvania receiving disparate treatment of their Pennsylvania product liability actions depending on whether they are in state or federal court." *Id.*

Significantly, and contrary to the court in *Richetta*, the court in *Durkot* found that *Bugosh* invalidated the court of appeals' prediction in *Berrier*. The court reasoned:

> [W]e find that the Third Circuit's prediction as to the Pennsylvania Supreme Court's adopting the Restatement Third simply did not hold true. When presented with the opportunity to adopt the Restatement (Third), even after granting the appeal on the precise issue and hearing extensive oral argument, the [Pennsylvania Supreme] Court did not take the opportunity to do so. We acknowledge that the Court also did not

> specifically reaffirm the existing law. However, by failing to take action, contrary to the Third Circuit's prediction, Section 402(a) remains the law in Pennsylvania.

Id. at *11 (emphasis added). Accordingly, the court held that § 402A of the Second Restatement applied to plaintiff's strict liability claim.

Richetta and *Durkot* are perfect examples of the confusion and inconsistencies that lay ahead in the Commonwealth of Pennsylvania if the court of appeals' decision in *Berrier* is permitted to stand. Moreover, these decisions illustrate the adverse consequences that can result from a federal court's improper decision to change state law. Simply put, these two decisions are clear and convincing evidence of why it is necessary for this Court to vacate the court of appeals' decision in *Berrier* under the long-established principles of federalism embodied in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

CONCLUSION

For the reason set forth herein, the petition for certiorari should be granted.

Respectfully submitted,

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